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Supreme Court, U.S.
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No. 95-

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SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

October Term 1995

CLYDE E. CLEMENTS, JR.,

Petitioner,

V.

THE BABCOCK & WILCOX COMPANY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The District Court disregarded undisputed material facts of record that create genuine issues for trial, and denied Petitioner a reasonable opportunity to complete his discovery by denying him a hearing of his motion to compel Respondent to answer his discovery requests. Further, the District Court and the Appeals Court overlooked evidence of what appears to be obstruction of justice by Respondents-Defendants. Does the District Court's granting Defendants' motion for summary judgment - and the Appeals Court's affirming the District Court's judgment - represent "grave miscarriages of justice"[1] that must be corrected?

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[1] Quotation from *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 Harv.L.Rev. 5, 13 (1949)

PARTIES TO THE PROCEEDING

PETITIONER-PLAINTIFF: Clyde E. Clements, Jr.

RESPONDENT-DEFENDANTS: The Babcock & Wilcox Company; Employee Assistance of Central Virginia, Incorporated; Frank C. Allen, Jr.; Merle T. Alvis; Laurie L. Boykan; James A. Conner; John P. Eckert; John A. Fees; Susan S. Grainger; Robert E. Howson; Dewitt T. Lefew, III; Lawrence L. Lineberry; Lonza R. Pagans, Jr.; George K. Slough; Steven W. Smith; and Roger E. Tetrault.

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In the
Supreme Court of the United States

October Term, 1995

CLYDE E. CLEMENTS, JR.
Petitioner,
V.

THE BABCOCK & WILCOX COMPANY, et al.,
Respondents

Petition for Writ of Certiorari to the
Supreme Court of the United States
Fourth Circuit Court of Appeals

Clyde E. Clements, Jr. respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The unpublished per curiam opinion of the Fourth Circuit Court of Appeals is set out in the Appendix, *infra*, 3a-4a. Clements v. Babcock & Wilcox, et al., Record No. 95-2053 (4th Cir. November 27, 1995). That opinion affirmed the decision of the U.S. District Court for the Western District of Virginia, Lynchburg Division, the Memorandum Opinion and Order of which are set out in the Appendix, *infra*, 5a-19a. Clements v. Babcock & Wilcox, et al., C.A. No. 92-61-L (W.D. Va. April 24, 1995). The Memorandum Opinion of the District Court is not reported.

STATEMENT OF JURISDICTION IN THIS COURT

The opinion of the Court of Appeals in this matter was issued and entered on November 27, 1995. Petitioner filed his Petition for Rehearing with Suggestion for Rehearing in Banc with the Court of Appeals on December 11, 1995. The Court of Appeals Order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing in Banc was filed January 12, 1996. No motion for extension of time for filing a Petition for Certiorari has been filed.

This Court has jurisdiction to consider this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106. The Order of the district court granting summary judgment was a final order, and jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291.

STATUTES INVOLVED IN THE CASE

This Petition involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.

STATEMENT OF THE CASE

This civil action was brought by Petitioner-plaintiff Clyde E. Clements, Jr. against The Babcock & Wilcox Company ("B&W"), et al., under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), et seq. ("Title VII"), under 42 U.S.C. § 1985(3), and under pendent claims arising under the common law of the Commonwealth of Virginia.[2] The District Court had jurisdiction of Mr. Clements' claims in the first instance pursuant to 42 U.S.C. § 2000e et seq., 28 U.S.C. § 1343 and 28 U.S.C. § 1331.

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[2]Mr. Clements alleges in his Second Amended Complaint that B&W injured him by conspiring with others to: carry out an entrapment scheme of sexual harassment against him; intentionally inflict emotional distress on him; interfere with his civil rights; harass him in the course of employment in a specific manner with the intent that, upon Mr. Clements' reporting the facts of the harassment, the facts themselves would be used by B&W and its co-conspirators to discredit him by falsely indicating that he was paranoid and therefore was incapable of giving reliable testimony; send him to co-conspirator Employee Assistance of Central Virginia, Inc. ("EACV") in retaliation for complaining of acts made unlawful by Title VII; make defamatory communications about Mr. Clements to the DOE with the intent of triggering the DOE investigation of him in retaliation for his complaining of acts made unlawful by Title VII, and; discharge him in retaliation for complaining of acts made unlawful by Title VII.

Mr. Clements is a 49 year-old white male. At the time of the events giving rise to this litigation, Mr. Clements was employed by the Naval Nuclear Fuel Division ("NNFD") of the Babcock & Wilcox Company ("B&W") as an engineer. He was hired by B&W, on June 18, 1984. For the entire time that he was employed by B&W, he received only "Good" to "Very Good" Job Performance Evaluations ("JPE's"), and he regularly received raises and promotions. D.E. 66(Vol.5) at 32[3]; D.E. 67 at 1, 2 (See Appendix, *infra*, at 6a). Further, Mr. Clements was never disciplined in any way for any reason until the day he was fired without notice. Informal Reply Brief of Appellant, exh. E at 18; D.E. 65, attach. B at 38; Appendix, *infra*, at 49a.

In the meeting of November 21, 1989 with his supervisor, Gary Camper ("Camper") and co-worker defendant Laurie L. Boykan ("Boykan"), Mr. Clements complained of an alleged incident of sexual harassment by Boykan, and of other bizarre behavior by Boykan. He complained of the unlawful harassment to B&W again on January 8, 1990 in his meeting with Respondent-defendant Merle Alvis ("Alvis"), then Manager of Human Resources and defendant Lawrence Lineberry ("Lineberry"), then Manager of Employee Relations. Alvis responded, "... You must have done something or said something to encourage her to do that. I don't think you are capable of working with women." D.E. 66(Vol.5) at 28; See Appendix, *infra*, at 47a.

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[3]"D.E. __" refers to the docket entry numbers on the docket sheets maintained by the District Court. "exh. ___" refers to the document exhibit identification.

Mr. Clements again complained of the harassment to B&W in his January 15, 1990 meeting with Respondent-defendant Roger Tetrault ("Tetrault"), then Vice President and General Manager of B&W, NNFD and Mr. Camper. Tetrault said in words or in substance, "I think you think these things are going on because of your Vietnam experiences." D.E. 60(Vol.4) at 4, Lines 16-18. On the same day B&W made arrangements for him to go to defendant Employee Assistance of Central Virginia, Inc. ("EACV"), a non-profit corporation that provides counseling services for B&W employees.

On February 20, 1990 Mr. Clements complained to the Veterans Administration ("VA") about B&W's sending him to EACV purportedly because of his Vietnam experiences, and about EACV's treatment of him. Thereafter, the VA requested a copy of Mr. Clements' record from EACV. In a further effort to assist Mr. Clements, the VA contacted the Department of the Navy Inspector General's Office to see if they would investigate B&W. Plaintiff's Supplemental Filing in Opposition to Defendants' Motion for Summary Judgment filed 3/15/95, first attachment. See Appendix, *infra.*, at 50a-52a ; and D.E. 66(Vol.5) at 26.

Mr. Clements complained of acts made unlawful by Title VII, including harassment and retaliation by B&W managers in his June 22, 1990 letter to McDermott, Inc., B&W's parent company. D.E. 22, attach. D & E. Thereafter, B&W made communications to the DOE that resulted in the DOE's investigating Mr. Clements. D.E. 57, exh. G at 5th & 6th pages. The DOE found that Mr. Clements was still eligible for a security clearance. Thereafter, Mr. Clements began writing letters to the DOE.

Mr. Clements complained of harassment and discrimination, including the incident of sexual harassment by Boykan that occurred on August 18, 1989, in violation of Title VII in his February 12, 1990 letter to the United States Equal Employment Opportunity Commission ("EEOC"). D.E. 55, exh. A. The EEOC's letter to Mr. Clements dated November 25, 1991 (D.E. 55, exh. B) documents that the EEOC received Mr. Clements' letter on February 14, 1990, which is within the 180-day limitation period.

In response to the EEOC's instructions contained in its abovementioned November 25, 1991 letter, Mr. Clements sent the EEOC additional information via his December 3, 1991 letter to the EEOC. D.E. 55, exh. C. The EEOC prepared a formal "Charge of Discrimination" that was signed by Mr. Clements on February 11, 1992, and was then filed by the EEOC on February 13, 1992. D.E. 42, exh. G. Please also see D.E. 55, at 2, 3.

The EEOC issued a Letter of Determination with notice of right to sue on July 30, 1992, finding that the one time incident Mr. Clements complained of as sexual harassment occurred, but that a one time incident is insufficient to establish that he had been sexually harassed. D.E. 22, attach. O-1; Appendix, *infra*, at 25a.

In the August 13, 1992 meeting initiated by B&W that was attended by Mr. Clements, Lineberry and defendant Steven Smith ("Smith"), Mr. Clements brought up the topic of the DOE. Lineberry responded in words or in substance that any government-related concerns of Mr. Clements were between Mr. Clements and the government. Lineberry wrote "it's between you & gov't." in his notes of the meeting. Informal Reply Brief of Appellant, exh. F.

Having received assurances from B&W in abovementioned August 18, 1992 meeting that any of his government-related concerns would be considered by B&W to be between Mr. Clements and the government - and having never been made aware by B&W of any concerns it may have had with any of Mr. Clements' previous letters to the government, Mr. Clements sent his August 17, 1992 letter to the DOE. (D.E. 22, attach. R), which included the following statements:

> I am going to evaluate all legal means for filing suit against the D.O.E. for acting as an accomplice in the unlawful harassment of me"; "I demand that the D.O.E. address what I reported to PNR as a national security issue!"; "I demand that the D.O.E. exercise its legal right to use polygraph testing..."; "If I do not receive a written response from you...I am going to ee if Senator Warner can do something about this.

D.E. 67, at 4; Appendix, *infra*, at 9a.

B&W terminated Mr. Clements' employment without notice on September 21, 1992. On that day B&W issued its "Disciplinary Report" (B&W's Statement of Undisputed Material Facts filed with District Court 12/9/94, exh. M) in which B&W states its alleged reasons for firing Mr. Clements, including the following:

> ... You have...made the following accusations against management in your writings: ... Ten Company employees...have harassed, discriminated against, retaliated against, and attempted to inflict severe emotional distress upon you. ... On the basis of your conduct, as summarized above, your employment

with Babcock & Wilcox, NNFD is being terminated, effective immediately.

On October 26, 1992 Mr. Clements filed his second complaint with the EEOC, charging that he was fired in retaliation for complaining of acts made unlawful by Title VII. B&W's Statement of Undisputed Material Facts filed with District Court 12/9/94, exh. N. The EEOC issued its Letter of Determination on February 23, 1994, finding that:

> Charging Party's discharge documents reveal that he was discharged in part for his accusations that management harassed, discriminated and retaliated against him. . . . The evidence of record supports Charging Party's allegation that he was discharged in part for opposing practices made unlawful by Title VII. However, it appears as if the other reasons set forth on Charging Party's discharge document also accurately account for his discharge.

D.E. 22, exh. Y; Appendix, *infra*, at 20a-22a.

Mr. Clements filed his Complaint with the District Court on October 30, 1992. D.E. 1; his Amended Complaint on February 5, 1993. D.E. 8; and his Second Amended Complaint on June 28, 1994, which added defendants and Counts. D.E. 22.

Appellees-defendants filed a Motion for Reconsideration of Order Granting Plaintiff's Motion to File Second Amended Complaint. After argument, the District Court granted the Motion on September 9, 1994. D.E. 33.

On December 9, 1994 Respondent-Defendants filed a

Motion for Summary Judgment. D.E. 41; D.E. 43. In order to respond to B&W's motion, Mr. Clements noticed and took five depositions and received B&W's response to his first set of discovery requests (DISCOVERY LETTER filed 10/14/94. See D.E. 65, attach. C for Mr. Clements' first Request for Documents to B&W). Mr. Clements also responded to B&W's discovery request.

B&W claims in its Motion for Summary Judgment that Mr. Clements was fired for disloyalty. The only conduct of Mr. Clements that B&W claims was disloyal is his letters he sent to McDermott, Incorporated, B&W's parent company (D.E. 22, exh. D); to the Navy (D.E. 22, exh. G); to Department of Labor; to the Veterans Administration; to the DOE (D.E. 22, exh. R); and to Senator John Warner (D.E. 22, exh. R). In the letters Mr. Clements made statements including but not limited to:

> "Would you like to have people like me taking care of your product, or would you prefer a gang of 'submissive whores'?" "NNFD management is slowly but surely convincing me that employees with true honesty and integrity are not wanted - they are looked upon as a threat." D.E. 22 exh. G at 6. "Do you know that some managers took part in a scheme designed to make Chip Clements appear to be paranoid?" D.E. 22, exh. F at 3. D.E. 42 at 6, 7.

D.E. 67 at 11; Appendix, *infra*, at 16a, 17a.

On January 18, 1995 Mr. Clements took the deposition of Respondent Conner, who was Vice President and General Manager of B&W, NNFD at the time B&W fired Mr. Clements. During the taking of his deposition Mr.

Clements asked him, "Do you have any reason to believe that I was a disloyal employee?", to which Conner responded, "No." Conner was also asked, "Even though you did not see those letters, are you aware that I made allegations of wrong doing by Babcock & Wilcox managers?", to which Conner responded, "Sure." D.E. 69(Vol.7) at 13 and 11, respectively; Appendix, *infra*, at 43a.

Mr. Clements also asked Conner during the taking of his deposition, "Was a PNR investigation of me conducted that was not a routine investigation?", to which Conner responded, "Not that I'm aware of." (D.E. 69(Vol.7) at 6, 7; Appendix, *infra*, at 45a, 46a) even though Respondents-Defendants stated in their ANSWER OF DEFENDANTS TO THE SECOND AMENDED COMPLAINT, "... Defendants admit that Defendant Conner told Plaintiff that Pittsburgh Naval Reactors ("PNR") was going to conduct an investigation." D.E. 36, at ¶ 105; Appendix, *infra*, at 46a. Further, B&W admits in its MEMORANDUM OF POINTS AND AUTHORITIES that B&W requested the unscheduled DOE investigation of Mr. Clements. D.E. 41 at 22.

Mr. Clements also took the deposition of his supervisor, Camper. Camper stated that he completed an "enrollment form for EAP" in preparation for Mr. Clements to go to EACV, and then gave it to Lineberry. D.E. 65, attach. B at 32; Appendix, *infra*, at 45a.

On January 11, 1995 Mr. Clements served his second set of discovery requests on B&W (DISCOVERY LETTER filed 1/12/95; see attachment to B&W's Motion to Stay Discovery, D.E. 58, for copy of Mr. Clements' second set of discovery requests). On March 2, 1995 he filed his second Motion to Compel B&W to answer his discovery requests

(D.E. 59), in which he specifically requested that the Court compel B&W to produce the "enrollment form for EAP" that Camper had admitted to completing; and which B&W had not produced in response to Mr. Clements' Request No.'s 7, 8 and 18 of his first Request for Production of Documents served on B&W (See D.E. 65, attach. C). In said Motion Mr. Clements also asked the Court to hear his Motion to Compel in the Hearing of Motions set for March 9, 1995. B&W filed its Motion to Stay Discovery on March 2, 1995. D.E. 58.

Following are the documents known to have existed that were not produced in response to Mr. Clements' two sets of discovery requests served on B&W and his Subpoena Duces Tecum served on EACV (PAUL, HASTINGS, JANOFSKY & WALKER represent both B&W and EACV in this action):

a) Mr. Clements' "Enrollment form for EAP" completed by Camper.

b) Documentation of the George Ramey v. B&W and Kay Hamilton v. B&W discrimination suits.

* c) MMPI Chart and "MMPI INTERPRETATION", both of which relate to the personality test EACV had Mr. Clements take.

* B&W, in its answer to Mr. Clements' first set of discovery requests produced hand-written notes stating, "SUSAN" . . . "CEC called requesting records & EAP provided all except MMPI. . ..". Informal Reply Brief of Appellant, exh. B.

Further, B&W had redacted portions of numerous

documents produced in response to Mr. Clements' First Request for Production of Documents; and B&W had not answered Mr. Clements' second set of discovery requests.

On March 7, 1995 the District Court ORDERED that B&W's Motion to Stay Discovery be granted (D.E. 62.), thereby denying Mr. Clements a hearing of his Motion to Compel. The Hearing of Motions took place on March 9, 1995. D.E. 66(Vol.5).

On April 24, 1995 the District Court granted B&W's Motion for Summary Judgment and entered a final judgment in favor of all defendants.[4] D.E. 68; Appendix, *infra*, at 19a. The court found that B&W had rewarded Mr. Clements with "good" to "very good" JPE's and with raises and promotions up until his termination. D.E. 67 at 1, 2; Appendix, *infra*, at 6a. The court also found that Mr. Clements' claims of hostile environment sex harassment and retaliation in the course of his employment were barred by the Title VII's 180-day statute of limitation. D.E. 67 at 6, 8; Appendix, *infra*, at 10a, 13a. The court dismissed Mr. Clements' claim for retaliatory discharge on the grounds that (a) he failed to establish a causal connection between Mr. Clements' filing his original EEOC charge and the B&W's decision to terminate him, and (b) he had failed to produce any competent evidence to demonstrate the B&W's asserted reasons for firing him were pretext. D.E. 67 at 8-11; Appendix, *infra*, at 13a, 17a.

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[4]The Memorandum Opinion of the District Court, issued on April 24, 1995, is reproduced in its entirety in the Appendix, *infra.*, at 5a-18a.

Mr. Clements' appeal to the Appeals Court was docketed on May 31, 1995. Mr. Clements alerted the Appeals Court to evidence of what appears to be obstruction of justice by Respondents-Defendants in five (5) pleadings: 1) Informal Brief of Appellant, at 26, 27, 34 & 35; 2) Informal Reply Brief of Appellant, at 3-7, 24 & 25; 3) Supplement No. 2 To Informal Reply Brief of Appellant, at 12, 18, 19, 23; 4) Supplement No. 3 To Informal Brief of Appellant, at 1-6; and 5) Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc, at 3, 6, 7, 9. See Appendix, *infra*, at 32a, 33a, 36a, 37a, 39a. The Appeals Court affirmed on the reasoning of the District Court, finding no reversible error.[5]

On December 11, 1995 Mr. Clements filed his Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc (Appendix, *infra*, at 27a-42a) with the Appeals Court; and on January 12, 1996 the Appeals Court filed its Order denying Mr. Clements' Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc. Appendix, *infra*, at 1a, 2a.

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[5]The unpublished per curiam opinion of the Appeals Court issued on November 27, 1995, is reproduced in its entirety in the Appendix, *infra*, at 3a, 4a.

REASONS FOR GRANTING THE WRIT

THE DISTRICT COURT'S GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - AND THE APPEALS COURT'S AFFIRMING THE DISTRICT COURT'S JUDGMENT - REPRESENT A "GRAVE MISCARRIAGE OF JUSTICE"[1] THAT MUST BE CORRECTED

I. THE APPEALS COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, BY ITS SANCTIONING SUCH DEPARTURE BY THE DISTRICT COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

When a court does not consider facts of record that are material to the case, it is said that the court overlooked those facts. Where the record shows that the court did not consider numerous material facts in its findings and rulings even though they had been repeatedly brought to the attention of the court, then it logically follows that the court deliberately overlooked those material facts.

A. THE COURTS BELOW REPEATEDLY OVERLOOKED UNDISPUTED MATERIAL FACTS OF RECORD THAT CREATE GENUINE ISSUES FOR TRIAL

1. THE COURTS BELOW REPEATEDLY OVERLOOKED DIRECT EVIDENCE OF DISCRIMINATION THAT IS THE CAUSAL CONNECTION BETWEEN THE PROTECTED ACTIVITY AND THE ADVERSE EMPLOYMENT ACTION

The District Court states in its Memorandum Opinion:

> Plaintiff first must make out a prima facie case of retaliatory discharge by proving the following: "1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action." Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). . . . The court finds at the outset that plaintiff has failed to make out a prima facie case of retaliatory discharge . . . Clements has failed to prove the causation element. . . . plaintiff has not presented a shred of evidence . . . to meet his burden to show that B&W would not have terminated him but for his claims with the EEOC.

D.E. 67 at 8, 9; Appendix, *infra*, at 13a-15a.

Mr. Clements repeatedly brought the "causation element" - the same "causation element" that prompted the EEOC's finding of "mixed motives" (D.E. 22, attach. Y; Appendix, *infra*, at 21a) - to the attention of the District Court and to the Appeals Court, and both courts disregarded it.

B&W states the "causation element" in plain and simple language in its "Disciplinary Report" (B&W's Statement of Undisputed Material Facts, exh. M):

> ... You have...made the following accusations against management in your writings: ... Ten Company employees...have harassed, discriminated against,

> retaliated against, and attempted to inflict severe emotional distress upon you. ... On the basis of your conduct, as summarized above, your employment with Babcock & Wilcox, NNFD is being terminated, effective immediately.

("Causation Element")

Mr. Clements brought the **Causation Element**, which is also direct evidence of discrimination, to the attention of the District Court three (3) separate times: 1) Plaintiff's Response to Defendants' Motion for Summary Judgment, D.E. 55 at 15, 16; 2) Plaintiff's Reply to Defendants' Reply Memoranda, D.E. 57 at 4, 5; and 3) during the Hearing of Motions, D.E. 66(Vol.5) at 30 (See Appendix, *infra*, at 48a).

Mr. Clements brought the **Causation Element** to the Appeals Court's attention three (3) separate times: 1) Informal Brief of Appellant filed June 26, 1995 at 7-9; 2) Informal Reply Brief of Appellant filed August 23, 1995 at 14-19; and 3) Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc filed December 11, 1995 (See Appendix, *infra*, at 34a).

2. THE COURTS BELOW REPEATEDLY OVERLOOKED MATERIAL FACTS OF RECORD THAT MAKES PETITIONER'S LOYALTY A GENUINE ISSUE FOR TRIAL

The District Court states in its Memorandum Opinion:

> . . . even assuming plaintiff's proof were sufficient to make out a prima facie case, B&W has presented a

> legitimate, nondiscriminatory reason for its decision. The court is of the opinion that plaintiff's interminable allegations of conspiracy and extensive letter-writing constitute conduct that is unprotected under Title VII . . . Title VII does not require any employer to countenance such disloyal behavior simply because an employee is pursuing relief under Title VII . . . Clements has not presented a scintilla of evidence to show that B&W's stated reasons for his discharge were merely a pretext.

D.E. 67 at 10, 11; Appendix, *infra*, at 16a, 17a.

a. Respondent Conner's Deposition Contradicts B&W's Key Assertion That Petitioner Was Fired for Disloyalty. This Creates a Genuine Dispute of Material Fact. There Being a Question of Fact, the Issue of Petitioner's Loyalty must Go to Trial.

During the taking of Respondent Conner's deposition Mr. Clements asked, "Do you have any reason to believe that I was a disloyal employee?", and Conner responded, "No." D.E. 69(Vol.7) at 13; See Appendix, *infra*, at 43a. This contradicts B&W's key assertion that Mr. Clements was fired for disloyalty (See B&W's Memorandum of Points and Authorities, at 15-18). Conner's "No" response creates a genuine issue that must go to trial ("**Loyalty Issue**").

Here again, Mr. Clements repeatedly brought to the attention of the District Court the **Loyalty Issue**: 1) Plaintiff's Response to Defendants' Motion for Summary Judgment, D.E. 55 at 20; 2) Plaintiff's Reply to Defendants' Reply Memoranda, D.E. 57 at 7; and 3) during the Hearing of Motions, D.E. 66(Vol.5) at 33, 34 (See Appendix, *infra*, at

49a).

The **Loyalty Issue** was brought to the attention of the Appeals Court three (3) separate times: 1) Informal Brief of Appellant at 23; 2) Informal Reply Brief of Appellant at 12, 13; and 3) Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc at 1 (Appendix, *infra*, at 31a).

b. B&W Gave Constructive Assent for Mr. Clements to Continue His Letter-Writing until The Day B&W Fired Him Without Warning

Mr. Clements repeatedly brought to the attention of the courts below material facts evidencing that Mr. Clements received B&W's constructive assent to continue his letter-writing - that is, until the day B&W fired him.[6] Therefore the courts below again knowingly and willfully overlooked the following material facts of record:

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[6]Constructive assent defined as,

> An assent or consent imputed to a party from a construction or interpretation of his conduct; as distinguished from one which he actually expresses.

Black's Law Dictionary (6th Ed. 1990), at 313

1) B&W Did Not Make Mr. Clements Aware of Any Displeasure it May Have Had with His Letter-Writing until the Day it Fired Him

Mr. Clements' first letter B&W claims was disloyal conduct is dated June 22, 1990. D.E. 22, attach. D. It is an undisputed fact that B&W did not make Mr. Clements aware of any displeasure it may have had with his letter-writing until the day it fired him without warning. Mr. Clements brought this fact to the attention of the District Court three (3) times: 1) D.E. 55 at 16-19; 2) D.E. 57 at 4; and 3) D.E. 66(Vol.5) at 32, 33, 38, 39. See Appendix, *infra*, at 49a.

Further, Mr. Clements brought this undisputed fact to the attention of the Appeals Court three (3) times: 1) Informal Brief of Appellant, at 17-23; 2) Informal Reply Brief of Appellant, at 20-22; and 3) Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc, at 4. See Appendix, *infra*, at 34a.

2) B&W Rewarded Mr. Clements with Good JPE's and Regular Raises And Promotions

The District Court found that B&W had given Mr. Clements "Good" to "Very Good" JPE's, and had rewarded him with regular raises and promotions up until the day B&W fired him. Appendix, *infra*, at 6a. It logically follows that an employer rewards an employee in this manner for good job performance and good conduct.

3) B&W Communicated to Mr. Clements That Any Government-Related Concerns of His Were Between Mr. Clements and the Government

During the August 13, 1992 meeting in which Mr. Clements, defendant Smith, and defendant Lineberry attended, Lineberry said to Mr. Clements in words or in substance, "Any government-related concerns of yours are between you and the govenment." in response to Mr. Clements' bringing up the topic of the DOE. Lineberry documented his statement to Mr. Clements by writing "It's between you & gov't" on his note pad, a copy of which is attached to Informal Reply Brief of Appellant as Exhibit F.

Please note that B&W states, "... B&W did inform Mr. Clements of its displeasure at the content of his letters ..." in its Informal Brief of Appellees at 18, without offering even a scintilla of supporting evidence. This is the first and only time B&W has made such a claim.

In Mr. Clements' judgment, a previously held undisputed material fact of record cannot be converted into a fact in dispute at the last minute by a party's simply making an unsubstantiated claim.

Having been given assurances by B&W that it considered his government-related concerns to be between Mr. Clements and the government, he sent his August 17, 1992 letter to the DOE (D.E. 22, attach. R); and B&W fired him on September 21, 1992 purportedly for the "disloyal" act of writing letters to McDermott and to the government. As clearly indicated by that letter to DOE, Mr. Clements was concerned that the DOE had investigated B&W's allegations relating to Mr. Clements, but had refused to investigate Mr. Clements' allegations of wrong-doing by B&W managers.

("Constructive Assent")

A newly enacted law cannot be applied so as to make conduct predating enactment unlawful. For the same reasoning, the court should not accept as a legitimate nondiscriminatory reason for discharge a particular conduct that the employer had **Constructively Assented** to just before discharging the employee without warning for that conduct. It logically follows that evidence of employer's intent must be considered in such cases.

3. THE COURTS BELOW REPEATEDLY OVERLOOKED MATERIAL FACTS OF RECORD REGARDING RESPONDENTS' INTENT

The evidence of record, including but not limited to abovementioned **Causation Element**, **Loyalty Issue** and **Constructive Assent**; and evidence of what appears to be obstruction of justice by Respondents (See Section I.B. *infra)*, compellingly shows Respondents' intent to be one of bad faith.

Mr. Clements brought the issue of Respondents'-Defendants' intent to the attention of the courts below; yet, the courts below repeatedly overlooked the related facts of record.

("Intent Issue")

B. THE COURTS BELOW REPEATEDLY OVERLOOKED EVIDENCE OF WHAT APPEARS TO BE OBSTRUCTION OF JUSTICE BY RESPONDENTS

"Hillary Clinton to Appear Before Grand Jury" was the front-page headline of the January 23, 1996 edition of the Washington Post. "The grand jury is exploring whether there

was any attempt to obstruct justice . . . ", the article stated. If the appearance of obstruction of justice is as serious a matter as the Whitewater investigation considers it, then it seems reasonable to expect that it must be treated as a serious matter in instant civil action as well.

The following is the evidence of what appears to be obstruction of justice by Respondents-Defendants - evidence that was brought to the attention of the courts below:

1. B&W DID NOT PRODUCE "ENROLLMENT FORM FOR EAP"

Gary Camper, Mr. Clements' supervisor, stated during the taking of his deposition that he had prepared an "enrollment form for EAP" for Mr. Clements to go to EACV purportedly for counseling. This document should have been produced in response to Request No. 7, 8, and/or 18 of Mr. Clements' first Request for Production of Documents served on B&W. D.E. 65, attach. C.; and/or in response to Mr. Clements' Subpoena Duces Tecum served on EACV.

2. EACV DID NOT PRODUCE MMPI CHART OR "MMPI INTERPRETATION"

B&W's alleged co-conspirator, EACV arranged for Mr. Clements to take a personality test known as the Minnesota Multiphasic Personality Inventory test, or MMPI. Mr. Clements' file maintained by EACV contained the MMPI Chart and "MMPI INTERPRETATION" relating to the MMPI test he had taken. Further, EACV had provided the DOE and the VA with a copy of each. Memorandum In Support of Plaintiff's Motion to Compel filed with District Court January 4, 1995, at 1-3.

Even though EACV had provided two government agencies with a copy of the abovementioned two documents, EACV did not produce them in response to Mr. Clements' Subpoena Duces Tecum. Memorandum in Support of Motion to Compel filed with District Court January 4, 1995, at 2-4. EACV stated in its January 4, 1995 Jon Geier, counsel for defendants letter to Mr. Clements, "I told you that we had already confirmed to you that the document is not contained in the files of either B&W or EACV." Mr. Clements' Supplement to Plaintiff's Memorandum In Support of Plaintiff's Motion to Compel, filed with the District Court January 9, 1995, exh. O, at 2.

B&W, in its answer to Mr. Clements' first set of discovery requests produced hand-written notes stating, "SUSAN" . . . "CEC called requesting records & EAP provided all except MMPI. . ..". Informal Reply Brief of Appellant, exh. B. This notation indicates that an individual at EACV by the name of "Susan" has knowledge of EACV's not producing the MMPI-related documents for Mr. Clements. To the best of Mr. Clements' knowledge the only "Susan" employed by EACV at that time was defendant Susan Grainger.

As stated in his first Motion to Compel B&W and EACV to answer his discovery requests (D.E. 46), Mr. Clements requested that the court give him possession of the original MMPI-related documents. He was going to analyze them for authenticity as allowed by Fed. R. Civ. P., Rule 901., but was unable to do so since they had mysteriously disappeared. Removal of documents from Mr. Clements' confidential file maintained by EACV is in violation of § 54.1-2400.6 of the Code of Virginia. Informal Brief of Appellant at 5, 6.

3. B&W DID NOT PRODUCE DOCUMENTATION OF *KAY HAMILTON v. B&W* AND *GEORGE RAMEY v. B&W* DISCRIMINATION SUITS

Documentation of the George Ramey v. B&W and Kay Hamilton v. B&W discrimination suits should have been produced in response to Request No. 9 of Mr. Clements' first Request for Production of Documents served on B&W. D.E. 65, attach. C. This was brought to the attention of the Appeals Court in Informal Reply Brief of Appellant at 24-25.

4. RESPONDENT CONNER'S DEPOSITION HAS APPEARANCE OF OBSTRUCTION OF DISCOVERY

Mr. Clements asked Conner during the taking of his deposition, "Was a PNR investigation of me conducted that was not a routine investigation?", to which Conner responded, "Not that I'm aware of." (D.E. 69(Vol.7) at 6, 7) even though Respondents-Defendants stated in their ANSWER OF DEFENDANTS TO THE SECOND AMENDED COMPLAINT, "... Defendants admit that Defendant Conner told Plaintiff that Pittsburgh Naval Reactors ("PNR") was going to conduct an investigation." D.E. 36, ¶ 105. Appendix, *infra*, at 45a, 46a. Further, B&W admits in its MEMORANDUM OF POINTS AND AUTHORITIES that B&W requested the unscheduled DOE investigation of Mr. Clements. D.E. 41 at 22. It therefore logically follows that Conner committed the crime of perjury when he denied having any knowledge of abovementioned PNR investigation of Mr. Clements.

Conner's perjury had the effect of obstructing Mr. Clements' discovery. By claiming to have no knowledge of

the investigation, Mr. Clements was prevented from discovering Conner's knowledge of that investigation, including the names of all B&W personnel with knowledge of the DOE investigation of Mr. Clements, details of the related communications within B&W as well as between B&W and DOE, details of B&W's documentation relating to the investigation and specifically why B&W initiated the DOE investigation of Mr. Clements.

Even Marbury v. Madison, 1 Cranch 137 (1803) would have been reduced to insignificance had the courts overlooked the material facts of record that created genuine issues for trial. The judiciary's duty of providing a fair and impartial hearing of Mr. Clements' case is no less important than it was at the time it heard Marbury.

Any reasonable person, upon studying the record of instant case would conclude that the integrity of the United States District Court for the Western District of Virginia, and that of the United States Court of Appeals for the Fourth Circuit are in question. It is one thing for the courts' overlooking of material facts of record to have been inadvertent; but when the record gives the appearance that it was a deliberate act, it is quite another situation.

Thomas Jefferson wrote in his December 26, 1820 letter to Albert Gallatin, "... A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government." Thomas Jefferson, Writings (7th printing, 1984) at 1446. It is no doubt the will of the general public that the integrity of the judiciary be carefully and continually supervised. With all due respect, the time has come for this Court to demonstrate this function of its supervisory power.

C. THE ERRONEOUS LOWER COURTS' DECISIONS THREATEN PRIVATE ACTION AS A VITAL MEANS OF ENFORCING THE UNITED STATES' ANTI-DISCRIMINATION POLICIES WHERE, AS HERE, THE EMPLOYER CARRIES OUT DISCRIMINATORY ACTS VIA A SCHEME OR CONSPIRACY

Acts made unlawful by Title VII that are carried out by employers' schemes or conspiracies are difficult to prove because of their secretive nature. What makes them particularly dangerous is that the employer is, to a significant degree, in control of the evidence available to the injured party in the case he elects to take legal action: documents that are damaging to the employer can be systematically destroyed; the employer can arrange to have the targeted employee harassed by a large number of employer-managers in a bizarre manner so that if the injured party complains of the harassment, the employer will point to the bizarre facts of harassment he is complaining of as evidence that he is paranoid and is therefore not a credible witness.

Unfortunately, instant case does not stop there. As detailed above, the record gives the appearance that the courts below deliberately overlooked numerous material facts of record, which translates into **judicial bias** favoring Respondents-Defendants. The court can easily and effectively conceal its bias by relying on the same tactics the employer used - by pointing to the bizarre facts of harassment the injured party is compaining of as evidence that he is paranoid and is therefore not a credible witness.

This is precisely what occurred in instant case. Jon Geier, counsel for Respondents-Defendants deliberately implied during the Hearing of Motions that Mr. Clements is

paranoid, and the District Court picked up that ball and ran with it. D.E. 66(Vol.5) at 12, 13, 17, 18, 19, 22, 25, 26 - despite the fact that the record is replete with material facts evidencing that he is not paranoid: Plaintiff's Supplemental Filing In Opposition To Defendants' Motions For Summary Judgment filed in the District Court 3/23/95, in its entirety; Informal Brief of Appellant, at 35-42. See Appendix, *infra*, at 50a-52a.

II. THE APPEALS COURT HAS, BY ITS SANCTIONING THE DISTRICT COURT'S REASONING, DECIDED IMPORTANT FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

When a lower court deliberately overlooks material facts of record that call for application of instructions from this Court the lower court, by not applying said instructions is in direct conflict with this Court. This is precisely what has occurred in instant case.

In Mr. Clements' judgment, it does not logically follow that a lower court is excused from following instructions from this Court where the lower court deliberately overlooks material facts of record that require the instructions' application.

As stated above, the **Causation Element** (Appendix, *infa*, at 48a) and the **Loyalty Issue** created by Conner's deposition (Appendix, *infra*, at 43a) were repeatedly brought to the attention of the District Court; and even though said material facts are stated in numerous places in the record, the District Court did not even mention them in its Memorandum

Opinion (Appendix, *infra*, at 5a-18a).

As detailed above, said material facts of record were also repeatedly brought to the attention of the Appeals Court, to no avail. The Appeals Court simply affirmed the District Court's reasoning. Appendix, *infra*, at 3a, 4a. It therefore logically follows that the lower courts' disregarding these material facts of record was deliberate.

A. THE COURTS BELOW ARE IN CONFLICT WITH *McDONNELL DOUGLAS & BURDINE*

The District Court relies on Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985) in its Memorandum Opinion. D.E. 67 at 8. Appendix, *infra*, at 14a. Ross at 365 states:

> The sequence of proof and burdens prescribed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981) are applicable to retaliation cases under § 2000e-3 as well as to discriminatory treatment claims. . . . a prima facie case of retaliation consists of three elements: 1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action.

The District Court found that Mr. Clements proved the first two elements of a prima facie retaliatory discharge, but that he did not prove the third element. D.E. 67 at 8, 9. See

Appendix, *infra*, at 14a.

As demonstrated above, the District Court and the Appeals Court deliberately overlooked the **Causation Element** discussed above. McDonnell Douglas and Burdine instruct the lower courts to find prima facie case of retaliation where all elements of proof are satisfied. The courts below, by their deliberately not applying the **Causation Element** presented by Mr. Clements are in direct conflict with this Court.

B. THE COURTS BELOW ARE IN CONFLICT WITH *ANDERSON v. LIBERTY LOBBY, INC.*

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct 2505 (1986), 91 L.Ed.2d 202 this Court states, at 2511, n.5., ". . . summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." As detailed in STATEMENT OF THE CASE, *supra*, the District Court denied Mr. Clements a hearing of his Motion to Compel B&W to answer his discovery requests (D.E. 59) by granting defendants' Motion to Stay Discovery (D.E. 58; D.E. 62), even though a Hearing of Motions had already been set.

The District Court's denying Mr. Clements a reasonable opportunity to discover facts relevant to his case represents **abuse of discretion**. See Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc, Appendix, *infra*, at 39a, 40a.

CONCLUSION

As the record shows, Mr. Clements repeatedly brought to the attention of the courts below material facts creating genuine issues for trial, and the courts below ignored them. Mr. Clements repeatedly alerted the courts below to evidence of what appears to be obstruction of justice by Respondents-Defendants, and the courts below turned their backs to it. For the reasons given hereinabove, Petitioner Clyde E. Clements, Jr. respectfully requests that his Petition be granted, and that a writ of certiorari issue in this cause.

February 14, 1996

Respectfully submitted,

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APPENDIX

APPENDIX

1 - The United States Court of Appeals for the Fourth Circuit Order denying Mr. Clements' Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc, file January 12, 1996 ..... 1a, 2a

2 - The per curiam opinion of the United States Court of Appeals for the Fourth Circuit decided November 27, 1995 ..... 3a, 4a

3 - The Memorandum Opinion and Order of the United States District Court for the Western District of Virginia entered April 24, 1995 ..... 5a-19a

4 - EEOC Letter of Determination Dated February 23, 1994 That Addresses Mr. Clements' Charge of Retaliatory Discharge 20a-22a

5 - EEOC Letter of Determination Dated July 30, 1992 That Addresses Mr. Clements' Charges of Sexual Harassment and Retaliation 23a-26a

6 - Petition of Appellant for Rehearing with Suggestion for Rehearing in Banc 27a-42a

7 - Excerpts from Record on Appeal 43a-52a

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 12, 1996
No. 95-2053
CA-92-61-L

CLYDE E. CLEMENTS

Plaintiff - Appellant

v.

BABCOCK & WILCOX COMPANY; MERLE T. ALVIS; JAMES A. CONNER; ROGER E. TETRAULT

Defendants - appellees

and

EMPLOYEE ASSISTANCE OF CENTRAL VIRGINIA, INCORPORATED; FRANK C. ALLEN, JR.; LAURIE L. BOYKAN; JOHN P. ECKERT; JOHN A. FEES; SUSAN S. GRAINGER; ROBERT E. HOWSON; DEWITT T. LEFEW, III; LARRY L. LINEBERRY; LONZA R. PAGANS, JR.; GEORGE K. SLOUGH; STEVEN W. SMITH

Defendants

On Petition for Rehearing with Suggestion for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2053

CLYDE E. CLEMENTS,

Plaintiff-Appellant,

versus

BABCOCK & WILCOX COMPANY; MERLE T. ALVIS; JAMES A CONNER; ROGER E. TETRAULT,

Defendants-Appellees,

and

EMPLOYEE ASSISTANCE OF CENTRAL VIRGINIA, INCORPORATED; FRANK C. ALLEN, JR.; LAURIE L. BOYKAN; JOHN P. ECKERT; JOHN A. FEES; SUSAN S. GRAINGER; ROBERT E. HOWSON; DEWITT T. LEFEW, III; LARRY L. LINEBERRY; LONZA R. PAGANS, JR.; GEORGE K. SLOUGH; STEVEN W. SMITH,

Defendants.

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. James C. Turk, District Judge. (CA-92-61-L)

Submitted: November 16, 1995
Decided: November 27, 1995

Before MICHAEL and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Clyde E. Clements, Appellant Pro Se. Jenny Chien-Jen Wu, Jon A. Geier, PAUL, HASTINGS, JANOFSKY & WALKER, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant appeals from the district court's orders striking some Defendants and claims from his second amended complaint and granting summary judgment for Defendants on the remaining claims in this employment discrimination action in which Appellant alleged sexual harassment and retaliatory treatment and discharge. We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Clements v. Babcock & Wilcox Co., No. CA-92-61-L (W.D. Va. Sept. 9, 1994 & Apr. 24, 1995). We deny as moot Appellant's motion to disqualify the district court judge. Additionally, we deny Appellant's motion for oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CLYDE E. CLEMENTS,	)	
Plaintiff,	)	Civil Action No. 92-0061-L
v.	)	
	)	MEMORANDUM OPINION
THE BABCOCK &	)	
WILCOX COMPANY et al.,	)	By: Honorable James C. Turk
Defendant.	)	United States District Judge

This matter comes before the court on defendants' motions for summary judgment pursuant to Federal Rule of Civil Procedure 56.[1] Upon careful consideration of the record, the applicable law, the briefs submitted by the parties, and the arguments presented by counsel and plaintiff at the hearing, the court finds that it must grant defendants' motions for summary judgment.

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[1]Pursuant to this court's September 9, 1994 order striking certain portions of plaintiff's second amended complaint, the remaining defendants are as follow: Babcock & Wilcox Company ("B&W"), Merle T. Alvis ("Alvis"), James A. Conner ("Conner"), and Roger E. Tetrault ("Tetrault"). Defendant B&W has filed a motion for summary judgment. The three individual defendants have incorporated by reference the legal arguments set forth in B&W's motion and have provided additional grounds for summary judgment applicable to the individual defendants only. Since the court disposes of the case on the arguments common to all defendants, it need not address the additional contentions raised by the individual defendants.

I. BACKGROUND

From June 18, 1984 through his termination on September 20, 1992, plaintiff Clyde E. Clements ("Clements") worked for defendant B&W as an engineer in its Naval Nuclear Fuel Division ("NNFD") in Lynchburg, Virginia. At the time of his termination, plaintiff had attained the position of senior engineer and had received "good" to "very good" performance evaluations and regular raises.

B&W did the majority of its business with the federal government, through the Department of Energy ("DOE") and the Department of Defense ("DOD"). Its contracts with these agencies required B&W to follow certain security procedures. For example, DOE required that prospective employees obtain security clearance and that B&W report any employees whose behavior suggested a potential security threat. At DOE's discretion, it could subject the latter employees to a reinvestigation of their security clearance.

The facts relevant to this case begin with an alleged single incident of sexual harassment.[2] On November 11, 1989, Clements met with his supervisor, Gary Camper, to complain of alleged sexual harassment by a fellow employee. According to Clements, the incident occurred on August 18, 1989, while he and Laurie Boykan, a co-worker, were working late. Clements alleged that Boykan unbuttoned

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[2]Apparently, an incident involving Clements similar to that in the present case occurred several years earlier, in 1985. That incident is relevant only to the extent it might have motivated some of defendants' actions in handling this particular complaint.

several buttons on her blouse, exposing her chest to him. In addition, Clements claimed that she brushed against him. This was the full extent of the alleged episode. Clements has admitted that Boykan never engaged in flirtatious or suggestive conduct, that the August 18, 1989 incident was the only such occurrence, and that he had no subsequent problems working with Boykan.

In response to Clements' complaint, Camper investigated the incident. He informed Boykan, who vehemently denied the allegations, that B&W was investigating Clements's accusations. Ultimately, Camper and his supervisor concluded that the evidence did not support Clements's claims, but that they should monitor the situation. Camper informed both Clements and Boykan as to B&W's decision that Boykan had not sexually harassed Clements.

As a result of his dissatisfaction with the decision, Clements took his complaints higher up the chain of command. On January 8, 1990, Clements met with Larry Lineberry, the manager of human resources, and defendant Alvis, the manager of employee and community relations. Lineberry and Alvis ratified Camper's finding of no harassment, and recommended, in light of the facts surrounding this episode and the similar incident in 1985, that Clements attend counseling at B&W's Employee Assistance Program ("EAP").[3]

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[3]The EAP is a company funded benefit under which employees with personal or emotional problems may obtain confidential counseling. Participation in the program does not affect an employee's job security, nor is it associated with any stigma.

Still displeased, Clements met with Camper and defendant Tetrault, vice president and general manager of NNFD, on January 15, 1990. Now, Clements voiced additional suspicions of a conspiracy among his co-workers. Tetrault also suggested that Clements visit an EAP counselor. Clements did attend three sessions at EAP during January and February, 1990. B&W has produced unrefuted evidence that it neither required nor made a condition of continued employment participation in the program. Moreover, no adverse employment consequences resulted from Clements's EAP counseling.

Starting at around this time, Clements commenced what B&W has referred to as his "letter-writing campaign," which has continued virtually unabated to the present day. Essentially, his letters disparage B&W and its officers, managers, and employees, implying that they are conspiring against plaintiff. Among the recipients of these letters have been senior officials at DOE's Pittsburgh Naval Reactors Office ("PNR") and its office with the U.S. Navy.

Clements filed his initial charge with the Equal Employment Opportunity Commission ("EEOC") on December 4, 1991. On February 13, 1992, Clements amended his charge to include retaliation for filing an internal complaint. The EEOC issued its finding of no probable cause and issued a right to sue letter on July 30, 1992. Following his discharge from B&W, Clements filed a second charge with the EEOC on October 26, 1992. As to this charge, the EEOC issued its letter of determination on February 23, 1992, and a right to sue letter on April 13, 1994.

B&W took various steps to accommodate Clements during the period from his first complaint to his discharge. It took precautions to insulate the direct supervisors responsible for job performance evaluations from any knowledge of his complaints against the company. Indeed, Clements

continued to receive satisfactory performance evaluations throughout his tenure at B&W. In addition, B&W representatives met with Clements four times during July and August, 1992 in an attempt to allay his concerns. The company rejected Clements's demand, among other things, of over four million dollars.

The last straw leading to Clements's termination, according to B&W, was his August 17, 1992 letter to DOE Secretary James D. Watkins. Among other things, the letter stated as follows: (1) "I am going to evaluate all legal means for filing suit against the D.O.E. for acting as an accomplice in the unlawful harassment of me"; (2) "I demand that the D.O.E. address what I reported to PNR as a national security issue!"; (3) "I demand that the D.O.E. exercise its legal right to use polygraph testing . . . "; and (4) "If I do not receive a written response from you . . . I am going to see if Senator Warner can do something about this." B&W terminated Clements on September 20, 1992.

The procedural posture of the case is as follows. By order entered September 9, 1994, the court struck certain portions of plaintiff's second amended complaint, leaving three counts under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e et seq. Count One alleges sexual harassment, Count Two alleges retaliatory discharge, and Count Three alleges retaliation in the course of employment. Pursuant to the standard established by the Fourth Circuit Court of Appeals, this court notified plaintiff of defendants' motions. Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). Plaintiff was given an opportunity to submit counter-affidavits or other relevant evidence contradicting, explaining, or avoiding defendants' evidence. Plaintiff also was warned that a failure to respond might, if appropriate, result in judgment for defendants. Defendants and plaintiff have briefed the relevant issues extensively, and the court

held a hearing in this matter on March 9, 1995. In addition, plaintiff has responded to the Roseboro notice with a brief and various attachments. Thus, the motions are now ripe for the court's consideration.

II. ANALYSIS

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper where "there is no genuine issue as to any material fact." In this case, defendants "bear[] the initial burden of pointing to the absence of a genuine issue of material fact." Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)), cert. denied, 502 U.S. 1095 (1992). If defendants carry this burden, "[t]he burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." Id. at 718-19 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)).

Moreover, "[o]nce the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." Baber v. Hosp. Corp. of Am., 977 F.2d 872, 874-75 (4th Cir. 1992). Although admissibility of the evidence at trial is unnecessary, "'[u]nsupported speculation is not sufficient to defeat a summary judgment motion.'" Id. (quoting Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987)).

A. Counts One and Three: Timeliness of the EEOC Charges

Title VII requires that aggrieved parties follow

certain administrative procedures, one of which is the filing of a charge with the EEOC within 180 days of the alleged violation. 42 U.S.C. § 2000e-5(e).[4] The failure to file a charge within the statutory period precludes the court from considering the employees' claims. E.E.O.C. v. Hansa Products, Inc., 844 F.2d 191, 192 (4th Cir. 1988); Collins v. City of San Diego, 841 F.2d 337, 339 (9th Cir. 1988). Defendants contend that Clements's claims for sexual harassment (Count One) and retaliation in the course of employment (Count Three) are time-barred. The court agrees.

As to Count One, it is undisputed that the alleged sexual harassment occurred on only one date, August 18, 1989. Clements filed his charge of discrimination with the EEOC on December 4, 1991, well past the 180-day period. The court is unpersuaded by plaintiff's contention that his February 12, 1990 phone call and follow-up letter, received

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[4]That section states that

> [a] charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice . . . except that in a case of an unlawful employment practice with respect to which the person has initially instituted proceedings with a State or local agency . . . such charge shall be filed . . . within three hundred days after the unlawful employment practice occurred . . .

42 U.S.C. § 2000e-5(e).

by the EEOC on February 14, 1990, were sufficient to constitute a charge. As a preliminary matter, the alleged telephone conversation was clearly an impermissible means of filing a charge. See Lopez v. Sears Roebuck & Co., 493 F. Supp. 801, 806 (D. Md. 1980)(holding that the EEOC regulations "do not contemplate that telephone conversations be construed to be a filing of charges"). Moreover, the EEOC informed Clements by letter dated February 15, 1990 that his letter was insufficient: "Your letter concerning allegations of employment discrimination has been received. The information you provided is not sufficient for filing a charge of discrimination." Having reviewed Clements' letter to the EEOC, the court concurs with the EEOC's decision. Accordingly, the court finds that Count One is barred by the 180-day limitations period.

As to Count Three, Clements has alleged that retaliatory actions in the course of his employment occurred on January 8 and 15, 1990 and on July 2, 1991. Plaintiff filed his first charge alleging retaliation on February 12, 1992, more than seven months after July 2, 1991. Plaintiff contends that the allegations in his second amended complaint of "continuing violations" save his claims of retaliation in the course of employment by rendering his termination the date from which the 180-day period runs. Under a continuing violation theory, "the plaintiff must show 'a series of related acts, one or more of which falls within the 180 day period.'" Berry v. Board of Sup'rs of L.S.U., 715 F.2d 971, 979 (5th Cir. 1983)(citations omitted)(noting that "the precise contours and theoretical bases of [the theory] are at best unclear"). Plaintiff has presented no evidence of any specific acts of retaliation in the course of employment occurring after July 2, 1991. The court cannot consider plaintiff's discharge, over a year after the last alleged incident of harassment in the course of employment, related in any

way to these acts. Nor do plaintiff's unsupported allegations of conspiracy suffice to meet his burden on summary judgment. The court finds that Count Three also is barred by the 180-day limitations period.[5]

B. Count Two: Retaliatory Discharge

Title VII prohibits an employer from discriminating against an employee for, among other things, pursuing a charge with the EEOC. 42 U.S.C. § 2000e-3(a)[6] The standard burden-shifting proof scheme applies to actions for retaliatory discharge. Plaintiff first must make out a prima facie case of retaliatory discharge by proving the following:

---

[5]Since the court holds that plaintiff's failure to file timely his charges with the EEOC precludes this court from considering these claims on their merits, it need not address them in any detail today. The utter lack of substance to either Count One or Count Three, however, compels the court to note in passing that, on the current record, it would have no difficulty granting summary judgment on the merits as to both counts.

[6]Section 2000e-3(a) states, in pertinent part, as follows:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

"1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action." Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). If plaintiff successfully makes out a prima facie case for retaliatory discharge, the burden of production then shifts to defendants to show "a nondiscriminatory reason for the adverse action." Id. "Finally, if the employer produces a legitimate, nondiscriminatory explanation, the employee bears the ultimate burden of proving retaliation by demonstrating that the employer's proffered reason is pretextual." Id. (citing Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), cert. denied, 450 U.S. 979 (1981)).

The court finds at the outset that plaintiff has failed to make out a prima facie case of retaliatory discharge. While he has shown that he engaged in protected activity, pursuing claims of employment discrimination with the EEOC, and that the employer took adverse action against him by way of his termination, Clements has failed to prove the causation element. As a preliminary matter, B&W did not fire Clements until approximately seven months after he filed his last pre-termination charge with the EEOC. This length of time supports an inference that the discharge was not causally related to Clements's EEOC charges. See, e.g., Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986)(stating that "[t]he mere fact that [the employee] was discharged four months after filing a discrimination claim is insufficient to support an interference [sic] of retaliation"); Juarez v. Ameritech Mobile Communications, Inc., 746 F. Supp 798, 804 (N.D. Ill. 1990)(noting, in granting a motion for summary judgment, that "almost six months elapsed between the filing of [the employee's] complaint and her termination"), aff'd, 957 F.2d 317 (7th Cir.

1992).

More importantly, plaintiff has not presented a shred of evidence, other than bare allegations, to meet his burden to show that B&W would not have terminated him but for his claims with the EEOC. Mesnick v. General Electric Company, 950 F.2d 816, 828 (1st Cir. 1991), cert. denied, 112 S.Ct. 2965 (1992), involved facts similar to those in the present case. There, the employer did not discharge the employee until nine months after he first contacted the EEOC. Id. The court upheld the district court's grant of summary judgment in favor of the employer, reasoning as follows:

> In addition to this lack of temporal coincidence, we can find no other competent evidence of retaliation. . . . [The plaintiff] tendered nothing, direct or circumstantial, suggesting a retaliatory animus. To the contrary, the record, read as a whole, is more consistent with an employer's longstanding desire to improve an employee's behavior than with some sort of vengeful preoccupation. We can, after all, safely conclude, on the basis of undisputed facts, that [the employer] for many months endured conduct on [the plaintiff's] part which was much more antagonistic and disruptive than his eventual resort to the EEOC.

Id. Here, as in Mesnick, the record shows that B&W patiently tolerated Clements's groundless allegations of discrimination and conspiracy, his prolific letter-writing in disparagement of his employer, and his outlandish settlement demands. Indeed, the uncontroverted facts disclose that B&W went out of its way to accommodate plaintiff by providing free counseling at EAP, shielding his immediate supervisors from the dispute, and meeting with him on

numerous occassions in an attempt to remedy the wrongs that only plaintiff perceived. Because plaintiff has presented no evidence, other than the fact of his termination, to show retaliatory intent, he has failed to make out a prima facie case of discrimination.

Moreover, even assuming plaintiff's proof were sufficient to make out a prima facie case, B&W has presented a legitimate, nondiscriminatory reason for its decision. The court is of the opinion that plaintiff's interminable allegations of conspiracy and extensive letter-writing constitute conduct that is unprotected under Title VII:

> Title VII protection from retaliation for filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers. The public and the state should not have to suffer waste of public funds in countenancing the arrogant and bizarre conduct exhibited by [the employee].

Jackson v. St. Joseph State Hosp., 840 F.2d 1387, 1391 (8th Cir.), cert. denied, 488 U.S. 892 (1988). Not only was Clements's conduct unprotected, but also it was perfectly legitimate grounds on which to fire him. Among the many recipients of plaintiff's letters were major clients of B&W.

Moreover, his allegations were bizarre, uncivil, and inflammatory.[7] Title VII does not require any employer to countenance such disloyal behavior simply because an employee is pursuing relief under Title VII.

Finally, as discussed above, Clements has not presented a scintilla of evidence to show that B&W's stated reasons for his discharge were merely a pretext. Thus, the court finds that defendants are entitled to summary judgment as to Count Two.

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[7]Among the statements in his letters are the following:

1. "Would you like to have people like me taking care of your product, or would you prefer a gang of 'submissive whores'? NNFD management is slowly but surely convincing me that employees with true honesty and integrity are not wanted - they are looked upon as a threat."

2. "For what it is worth, I will not sit down, I will not shut up until those devious managers are asked the aforementioned questions in a polygraph test - or - they confess to taking part in a conspiracy . . . ."

3. "The behavior of the managers that I have reported is not simply mean, it is sick! The only way you can prove me wrong is thru [sic] polygraph testing . . . ."

4. "Do you know that some managers took part in a scheme designed to make Chip Clements appear paranoid?"

C. Injunctive Relief

Defendants also seek injunctive relief, "restrain[ing] Mr. Clements from further publication of his defamatory allegations." As the court finds such action inappropriate at present, it must deny defendants' request to enter a restraining order.

III. CONCLUSION

For the reasons stated, the court finds that it must grant defendants' motions for summary judgment. Plaintiff is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with the Clerk of this court within 30 days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5). An appropriate order consistent with this memorandum opinion shall be entered this day.

ENTERED: THIS 24th DAY OF APRIL, 1995.

/S/ James C. Turk
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CLYDE E. CLEMENTS,	)	
	)	
Plaintiff,	)	Civil Action No. 92-0061-L
	)	
v.	)	ORDER
	)	
THE BABCOCK & WILCOX COMPANY et al.,	)	By: Honorable James C. Turk United States District Judge
	)	
Defendant.	)	

In accordance with the memorandum opinion filed this day, it is

ADJUDGED AND ORDERED

that defendants' motions for summary judgment are GRANTED and that defendants' suggestion for an order restraining plaintiff from further publication of his allegations is DENIED.

The Clerk of Court shall strike the case from the Court's active docket and shall send certified copies of this order to plaintiff and all counsel of record.

ENTERED: THIS 24th DAY OF APRIL, 1995.

/S/ James C. Turk
UNITED STATES DISTRICT JUDGE

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Baltimore District Office

Charge Number: 122-93-0106

Clyde Clements
P. O. Box 3391
Lynchburg, VA 24503 Charging Party

vs.

Babcock & Wilcox
Naval Nuclear Fuel Division
P. O. Box 785
Lynchburg, VA 24505-0785 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

All requirements for coverage have been met.

Charging Party alleges that he was discharged in retaliation for filing previous EEOC charges of discrimination.

Respondent denies that the Charging Party has been a victim of discrimination and maintains that he was discharged for making rash negative allegations about management to federal agencies which could have a negative impact on its

business.

Respondent further stated that Charging Party's "performance on the job was not so good as to warrant our continuing to employ him considering the damage he was doing to the company as a result of his disloyal and disruptive conduct."

The Charging Party was hired as a full-time Engineer on June 18, 1984. He progressed to the position of Senior Engineer in the Core Assemblies Section, Engineering Department on April 15, 1989. He filed his initial EEOC charge of discrimination on July 30, 1992. A determination was issued on July 30, 1992. He was discharged on September 21, 1992.

Respondent does not dispute that the Charging Party was a good performer. Investigation revealed that he received an overall rating of "Very Good" on his most recent evaluation dated May 7, 1992. There were no negative comments on this evaluation.

Charging Party's discharge documents reveal that he was discharged in part for his accusations that management harassed, discriminated and retaliated against him.

The evidence of record supports Charging Party's allegation that he was discharged in part in retaliation for opposing practices made unlawful by Title VII. However, it appears as if the other reasons set forth on Charging Party's discharge document also accurately account for his discharge. There being lawful and unlawful reasons for Charging Party's discharge Respondent has violated Title VII to the extent that it relied on unlawful reasons for his discharge. The lawful reasons however preclude Charging Party from obtaining any

monetary relief or an award of reinstatement.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the Parties to join with it in reaching a just resolution of this matter. The confidentiality provisions of Section 706 and 708 of Title VII and Commission Regulations apply to information obtained during conciliation.

Enclosed please find a proposed conciliation agreement which contains those provisions which, under the Commission's rules, regulations and guidelines, would provide relief to the Charging Party, Clyde Clements. Please notify the Commission within (10) days of the receipt of the proposed agreement of your willingness to enter into the agreement.

If the Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement procedures available to aggrieved persons and the Commission.

On behalf of the Commission:

FEB 23 1994 /S/ Issie L. Jenkins

(Date) Issie L. Jenkins
District Director

Enclosure

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Baltimore District Office

Charge Number: 122-92-0185

Clyde Clements
P.O. Box 3391
Lynchburg, VA 24503 Charging Party

vs.

Babcock & Wilcox
Naval Nuclear Fuel Division
P.O. Box 785
Lynchburg, VA 24505 Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue on behalf of the Commission, the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended.

All jurisdictional requirements have been met.

Charging Party alleges that he was subjected to sexual harassment by a female co-worker on August 18, 1989, because of his sex, male. He also alleges that in retaliation for filing an internal complaint in January 1990 concerning the incident, he was required to report to the Employee Assistance Program (EAP).

The Respondent denies that the Charging Party has been a

victim of discrimination and maintains that it acted swiftly to investigate the Charging Party's complaint of sexual harassment. Its investigation did not substantiate that the incident of sexual harassment occurred. In addition, the Respondent denies taking any retaliatory actions against the Charging Party. The Respondent maintains that the Charging Party was treated in the same manner as all other similarly situated employees with respect to the Employee Assistance Program.

The Charging Party was hired as a full-time Engineer on June 18, 1984. He progressed to Senior Engineer in his current unit on April 15, 1989. His personnel file reveals that he has received "good" to "very good" performance evaluations during calendar years 1988, 1989, 1990 and 1991.

The alleged harasser, a female Engineer, was hired in October 1986. At various times, she has worked on the same project team with the Charging Party. She denies Charging Party's allegation that in August 1989, she unbuttoned her blouse so low as to expose her breast to the Charging Party. She denies making any sexual and touching the Charging Party.

Pursuant to the Respondent's internal grievance procedure the Charging Party filed a grievance. His matter was handled in a timely manner up the chain of command from his immediate Supervisor to the Vice-President/General Manager. The investigation did not substantiate the Charging Party's claims. Respondent determined that no further action was warranted.

The Respondent's EAP is a confidential, voluntary program

designed to provide professional assistance to employees who have personal problems which could affect their performance. The Vice-President/General Manager did suggest to the Charging Party that he avail himself of the EAP. Respondent has suggested the EAP to other employees, including those who have complained of harassment.

Investigation revealed that the Charging Party was involved in another incident of sexual harassment in 1985. In that incident he lodged a complaint and the female lodged a complaint. He was the alleged harasser. Charging Party, in the 1989 incident, alleged that there was a conspiracy against him by his co-workers. As a result of that statement the Respondent recommended that he seek the assistance of the EAP.

Case precedent has established that a one time incident, which occurred in this case, is insufficient to establish that the Charging Party was subjected to sexual harassment. Additionally, this investigation did not establish a nexus between the Charging Party's filing of a sexual harassment complaint and his referral to the EAP.

The evidence does not support a violation of the statute.

This determination and dismissal concludes the processing of this charge. This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission. **Following this dismissal, the Charging Party may only pursue this matter by filing suit against the Respondent(s) named in the charge within 90 days of receipt of this letter.** Otherwise, the Charging Party's right to sue will be lost.

On Behalf of the Commission

Jul 30 1992

/S/ Gloria L. Underwood

Date

Gloria L. Underwood
Area Director

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

RECORD NO. 95-2053

CLYDE E. CLEMENTS, JR.,
Plaintiff-Appellant,

V.

THE BABCOCK & WILCOX COMPANY,
MERLE T. ALVIS,
JAMES A. CONNER, and
ROGER E. TETRAULT,
in their individual and official capacities,
Defendants-Appellees.

PETITION OF APPELLANT FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

Clyde E. Clements, Jr., pro se
P. O. Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

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ARGUMENT

In the judgment of pro se Petitioner-Appellant Clyde E. Clements, Jr. ("Mr. Clements") the following situations exist:

A. The Court overlooked the following material facts in its decision:

1. **Upon Mr. Clements' asking appellant James A. Conner ("Conner"), Vice President and General Manager of the Naval Nuclear Fuel Division ("NNFD") of The Babcock & Wilcox Company ("B&W") during the taking of his deposition, "Do you have any reason to believe that I was a disloyal employee?", Conner responded, "No"** (REF: Lines 16 through 19 of Page 13 of DEPOSITION of James Conner, D.E. 69(Vol.7)[1]).

This material fact contradicts B&W's key assertion that it fired Mr. Clements for disloyalty, thereby creating a genuine dispute of material fact that must go to trial. Please note that the alleged "disloyal and disruptive conduct" by Mr. Clements is his letter-writing - there is no other conduct by Mr. Clements that B&W claims was "disloyal and disruptive". (REF: a) Section b. on Pages 15 through 18 of MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT BABCOCK & WILCOX COMPANY, D.E.41; b) Pages 23 and 24 of INFORMAL BRIEF OF APPELLANT filed with this Court on June 26, 1995, and; c) Section B.1. on Pages 12 and 13 of INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on August 23, 1995).

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1 "D.E.__" refers to the docket entry numbers on the docket sheets maintained by the District Court.

Please note that the court below did not address the material fact in Section A.1 above - nor the resulting genuine dispute of material fact - in its MEMORANDUM OPINION (D.E.67) even though Mr. Clements had alerted the court to its existence (REF:
a) Item 1. on Page 20 of PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, D.E.55; b) 3rd paragraph of Page 7 of PLAINTIFF'S REPLY TO DEFENDANTS' REPLY MEMORANDA, D.E.57, and; c) Line 25 of Page 33 through Line 15 of Page 34 of TRANSCRIPT of Hearing of defendants' Motion for Summary Judgment, D.E.66(Vol.5)).

2. **Mr. Clements asked Conner during the taking of his deposition, "Even though you did not see those letters** [Mr. Clements' letters to the Department of Energy ("DOE")], **are you aware that I made allegations of wrong doing by Babcock & Wilcox managers?"; and Conner responded, "Sure."** (Brackets and their contents added) (REF: Line 18 of Page 10 through Line 10 of Page 11 of DEPOSITION of James Conner, D.E.69(Vol.7)).

Conner was aware of Mr. Clements' letters to the DOE, and he was aware that Mr. Clements had made allegations of wrongdoing by B&W managers in those letters at the time he answered "No" to Mr. Clements' question, "Do you have any reason to believe that I was a disloyal employee?" during the taking of his deposition. This material fact strengthens the genuine dispute of material fact presented in Section A.1. above.

3. **Mr. Clements asked Conner during the taking of his deposition, "Was a PNR investigation of me conducted that was not a routine investigation?"; and Conner responded, "Not that I'm aware of"** (REF: Line 24 of Page 6 through Line 1 of Page 7 of DEPOSITION of James Conner, D.E.69(Vol.7), and;

B&W states in ¶ 105. of ANSWER OF DEFENDANTS TO THE SECOND AMENDED COMPLAINT (D.E.36), "...Defendants admit that Defendant Conner told Plaintiff that Pittsburgh Naval Reactors ("PNR") was going to conduct an investigation."

It therefore logically follows that Conner lied when he responded "Not that I'm aware of" when Mr. Clements asked him, "Was a PNR investigation of me conducted that was not a routine investigation?". (Please see Item 3. on Page 34 of INFORMAL BRIEF OF APPELLANT filed with this Court on June 26, 1995, and; Item a. on Pages 4 and 5 of SUPPLEMENT NO.3 TO INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on November 7, 1995).

Conner's lying during the taking of his deposition constitutes obstruction of discovery.

4. **Larry L. Lineberry ("Lineberry"), then manager of B&W, NNFD employee relations documented during his August 13, 1992 meeting with Mr. Clements that he told Mr. Clements that any government-related concerns of Mr. Clements were between Mr. Clements and the government.** Please see Section D. on Pages 20, 21, 22 and "EXHIBIT F" of INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on August 23, 1995.

5. **Mr. Clements sent his August 18, 1992 letter to then Secretary of the Department of Energy James Watkins after he had been given assurances by B&W (detailed in 4. above) that any concerns Mr. Clements had with the government was between Mr. Clements and the government.** (REF: "ATTACHMENT G" to SECOND AMENDED COMPLAINT, D.E.22; and 3rd paragraph of Page 4 of MEMORANDUM OPINION, D.E.67)

6. **B&W never made Mr. Clements aware of any displeasure it may have had regarding his letter-writing until the day it fired him** (REF: a) Lines 17 through 22 of Page 33 of TRANSCRIPT Motions Hearing, D.E.66(Vol.5); b) Section D. on Pages 20, 21 and 22 of INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on August 23, 1995), and; c) Line 16 of Page 30 through Line 1 of Page 31 of Alvis' deposition attached as "EXHIBIT E" to INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on August 23, 1995.

Please note that the court below did not find that B&W communicated to Mr. Clements its alleged displeasure with his letter-writing before the day it fired him. Please see MEMORANDUM OPINION, D.E.67 in its entirety.

7. **B&W states in its Disciplinary Report, "... You have...made the following accusations against management in your writings: ... Ten Company employees...have harassed, discriminated against, retaliated against, and attempted to inflict severe emotional distress upon you. ... On the basis of your conduct, as summarized above, your employment with Babcock & Wilcox, NNFD is being terminated, effective immediately."** (REF: "EXHIBIT M" to STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANT BABCOCK & WILCOX COMPANY'S MOTION FOR SUMMARY JUDGMENT, filed with the court below on 12/9/94).

This not only constitutes direct evidence of discrimination, it also serves as the causal connection between Mr. Clements' complaining of acts made unlawful by Title VII and B&W's firing him. Even though Mr. Clements alerted the court below as to the existence of this material fact (REF: a) Line 20 of Page 29 through Line 22 of Page 30 of TRANSCRIPT, D.E.66(Vol.5); b) Item 1.a. on

Pages 15 and 16 of PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, D.E.55, and; c) "UNDISPUTED FACT NO.9" on Pages 4 and 5 of PLAINTIFF'S REPLY TO DEFENDANTS' REPLY MEMORANDA, D.E.57), it was not addressed in the court's MEMORANDUM OPINION, D.E.67.

8. **The EEOC states in its Determination of Mr. Clements' retaliatory discharge complaint, "The evidence of record supports Charging Party's allegation that he was discharged in part in retaliation for opposing practices made unlawful by Title VII. ..."** (REF: 2nd paragraph on 2nd page of "ATTACHMENT Y" to SECOND AMENDED COMPLAINT, D.E.22).

The EEOC therefore found causal connection between Mr. Clements' complaining of acts made unlawful by Title VII and B&W's firing of him.

9. **In response to Mr. Clements' reporting his allegation of sexual harassment to her in their January 8, 1990 meeting, appellee Merle T. Alvis ("Alvis") responded, "You must have done something or said something to encourage her to do that"** (REF: Line 17 of Page 27 through Line 19 of Page 28 of TRANSCRIPT of Motions Hearing, D.E.66(Vol.5), and; Section E. on Pages 8 and 9 of INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on August 23, 1995).

Alvis' responding, "You must have done something or said something to encourage her to do that" constitutes direct evidence of discrimination.

10. **The EEOC stated in its Determination of Mr. Clements' sexual harassment complaint, "Case precedent has established that a one time incident, WHICH OCCURRED IN THIS CASE, is insufficient to establish that the Charging Party was**

subjected to sexual harassment." (Emphasis added) (REF: 2nd page of "ATTACHMENT O-1" to SECOND AMENDED COMPLAINT, D.E.22).

The EEOC found that the one time incident Mr. Clements complained of as sexual harassment did in fact occur.

11. **The "MMPI INTERPRETATION" relating to the MMPI test Employee Assistance of Central Virginia, Inc. ("EACV") had Mr. Clements take did at one time exist; and they were contained in Mr. Clements' confidential record maintained by EACV,** and;

Neither EACV nor psychologist Dr. E. Wayne Sloop (purported originator of the "MMPI INTERPRETATION") produced a copy of the "MMPI INTERPRETATION" relating to MMPI test that EACV had Mr. Clements take, in response to Mr. Clements' discovery requests. (REF: a) Section I.A. on Pages 1 through 7 of MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR THE COURT TO COMPEL filed with the court below on 1/4/95 (D.E.46); b) Item 1. starting on Page 8 and ending on Page 12 of PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, D.E.55; c) Section D. on Pages 5, 6, 7, and 8 of INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on August 23, 1995, and; d) Item b. on Pages 5 and 6 of SUPPLEMENT NO.3 TO INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on November 7, 1995).

EACV's not producing the "MMPI INTERPRETATION" constitutes obstruction of discovery.

12. **B&W, NNFD employee Kay Hamilton and former B&W, NNFD employee George Ramey filed discrimination suits against B&W. B&W withheld documents relating to the Hamilton and Ramey**

cases that were requested by Mr. Clements' Request Number 20. of PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO THE BABCOCK & WILCOX COMPANY, a copy of which is attached as "ATTACHMENT C" to PLAINTIFF'S RESPONSE TO THE COURT'S NOTICE, D.E.65 (REF: SUPPLEMENT TO "CREDIBILITY ASSESSMENT" on Pages 24 and 25 of INFORMAL REPLY BRIEF OF APPELLANT filed with this Court on August 23, 1995). The defendants acknowledged the existence of the Ramey v. B&W case during the Hearing of defendants' Motion for Reconsideration (REF: Line 25 on Page 4 through Line 7 of Page 5 of TRANSCRIPT, D.E.60(Vol.4).

B&W's withholding said documents constitutes obstruction of discovery.

B. This Court's judgment affirming the District Court's granting of defendants' Motion for Summary Judgment is in conflict with the following Courts, and the conflicts are not addressed in this Court's judgment of instant case:

* * *

BACKGROUND OF MR. CLEMENTS' DISCOVERY:

• Mr. Clements mailed his PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS and his PLAINTIFF'S FIRST SET OF INTERROGATORIES to B&W on October 13, 1994 (Please see DISCOVERY letter filed with the court below on 10/14/94).

• The Entry Date of the District Court's ORDER specifying the parties' discovery schedule is October 20, 1994 (D.E.38).

• Mr. Clements mailed his PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS and his PLAINTIFF'S SECOND SET OF INTERROGATORIES to

B&W by overnight mail on January 11, 1995 (REF: DISCOVERY letter filed with the court below on 1/12/95).

• Mr. Clements filed his second Motion to Compel B&W to fully answer his discovery requests on March 2, 1995 (D.E.59). On the same day B&W filed its Motion to Stay Discovery (D.E.58).

• Mr. Clements filed his PLAINTIFF'S RESPONSE TO DEFENDANT BABCOCK & WILCOX COMPANY'S MOTION TO STAY DISCOVERY on March 6, 1995 (D.E.61).

• The District Court's ORDER granting B&W's Motion to Stay Discovery was Entered on March 7, 1995 (D.E.62).

Mr. Clements' abovementioned second Motion to Compel (D.E.59) contained a request for his Motion to be heard during the hearing of defendants' Motion for Summary Judgment scheduled for March 9, 1995. If the court below had heard his second Motion to Compel it would have seen that B&W had been evasive in many of its answers to Plaintiff's first discovery requests; and that Mr. Clements filed his second Motion to Compel seventeen (17) days after the 30-day response period specified by Fed. R. Civ. P. Rules 33 and 34 had expired.

* * *

1. Oksanen v. Page Memorial Hosp., 912 F.2d 73 (4th Cir. 1990) at 78: "Appellate courts, both before and after the above three cases were decided, consistently have reversed summary judgment dispositions when the nonmovant has not had sufficient opportunities for discovery. .. An analogous situation presented itself in *Snook v. Trust Co. of Georgia Bank of Savannah*, 859 F.2d 865 (11th Cir.1988), where the district court had granted summary judgment while plaintiffs' motion to compel documents was pending. Reversing, the panel concluded that '[g]enerally

summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests.' 859 F.2d at 870."

As the record shows, Mr. Clements was unable to obtain responses to his second discovery requests served on B&W, and many of B&W's responses to his first discovery requests were at best vague. It therefore logically follows that this Court should reverse the District Court's granting of defendants' Motion for Summary Judgment and remand for further proceedings.

2. Lone Star Steakhouse & Saloon v. Alpha of Virginia, 43 F.3d 922 (4th Cir. 1995) at 929: "This Court affords a district court substantial discretion in managing discovery and reviews the denial or granting of a motion to compel discovery for abuse of discretion. *Erdmann v. Preferred Research, Inc.*, 852 F.2d 788, 792 (4th Cir.1988); *LaRouche v. National Broadcasting Co. Inc.*, 780 F.2d 1134, 1139 (4th Cir.1986)..."

The District Court's granting B&W's Motion to Stay Discovery was an abuse of discretion for the following reasons:

a) The court below erred in granting B&W's Motion to Stay Discovery without holding a Hearing of both B&W's Motion to Stay Discovery and Mr. Clements' Motion to Compel Discovery. The court had no other reasonable means of gathering the material facts essential to making just findings and rulings on the discovery issues;

b) Mr. Clements did not delay his discovery. Indeed, he served his first discovery requests on B&W before the court below had Entered its ORDER specifying the discovery schedule;

c) Mr. Clements could not reasonably have obtained the requested information from other sources (See PLAINTIFF'S FIRST REQUEST FOR PRODUCTION

OF DOCUMENTS, "ATTACHMENT C" to PLAINTIFF'S RESPONSE TO THE COURT'S NOTICE OF MARCH 31, 1995 FOR PLAINTIFF TO SUBMIT RELEVANT EVIDENCE CONTRADICTING, EXPLAINING OR AVOIDING DEFENDANTS' EVIDENCE, D.E.65), and;

d) Mr. Clements has a compelling interest in the requested information. Hearing of the parties' discovery-related Motions is the only reasonable means the court below has for making findings as to whether or not Mr. Clements' discovery requests deal with facts material to his case.

3. White v. Investors Management Corp., 888 F.2d 1036 (4th Cir. 1989) at 1040: "...the decision is reviewable as a final judgment under an abuse of discretion standard. *Godwin v. Federal Sav. & Loan Ins. Corp.*, 806 F.2d 1290 (5th Cir.1987)."

The court below granted B&W's Motion to Stay Discovery (D.E.62) without a Hearing, and granted defendants' Motion for Summary Judgment on grounds that Mr. Clements had presented insufficient evidence in support of his claims (MEMORANDUM OPINION, D.E.67). And in doing so, the court compounded its error. This constitutes abuse of discretion.

4. Morrison v. Nissan Co., Ltd., 601 F.2d 139 (4th Cir.1979) at 141: "And when the disposition of a case turns on a determination of intent, courts must be especially cautious in granting summary judgment, since the resolution of that issue depends so much on the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination..."

Mr. Clements alleges that B&W and others took part in a conspiracy with intent to injure him, and that the conspiracy included an entrapment scheme. Intent is a key

issue, and witness credibility is material to Mr. Clements' case. Therefore this case must go to trial.

5. Gordon v. Kidd, 971 F.2d 1087 (4th Cir. 1992) at 1094: "Where states of mind are decisive as elements of a claim or defense, summary judgment ordinarily will not lie. *Charbonnages*, 597 F.2d at 414."

6. Charbonnages de France v. Smith, 597 F.2d 406 (4th Cir. 1979) at 414: "...summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of claim or defense. ..."

7. McKinney v. Board of Trustees of Mayland Com. Col., 955 F.2d 924 (4th Cir. 1992) at 928: "... Summary judgments are appropriate in those cases where there is no genuine dispute as to a material fact *AND* it appears that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, ..." (Emphasis added).

Since there is a genuine dispute of material fact (See A.1. above), summary judgment is not appropriate in this case.

CONCLUSION

For the above reasons, Mr. Clements' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC should be granted.

Dated this the 8th day of December, 1995.

Respectfully submitted,

/S/ Clyde E. Clements, Jr.
Clyde E. Clements, Jr., pro se
P. O. Box 3391
Lynchburg, Virginia 24503
(804) 846-2521

CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of December, 1995, I caused a copy of the foregoing PETITION OF APPELLANT FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC to be served by first-class mail upon Jon A. Geier for PAUL, HASTINGS, JANOFSKY & WALKER, 1299 Pennsylvania Avenue, N.W., Tenth Floor, Washington, D.C. 20004-2400, counsel for the appellees.

/S/ Clyde E. Clements, Jr.

Clyde E. Clements, Jr., pro se

APPENDIX PART SEVEN

EXCERPTS FROM RECORD ON APPEAL

1. Deposition Excerpts Relating To The Issue of Mr. Clements' Loyalty.

a. Deposition of Respondent James A. Conner, Vice President and General Manager, B&W, NNFD:

Q: Did you ever see any of the letters that I wrote to the Department of Energy?

A: Not that I'm aware of. I saw the ones that you sent to me directly. . . . .

Q: Even though you did not see those letters, are you aware that I made allegations of wrong doing by Babcock & Wilcox managers?

A: Sure. . . . .

Q: Do you have any reason to believe that I was a disloyal employee?

A: No.

D.E. 69 (Vol.7) at 10, 11, 13.

2. Deposition Excerpts Relating To B&W's Giving Constructive Assent For Mr. Clements to Continue His Letter-Writing.

a. Deposition of Respondent James A. Conner:

Q: Was I ever disciplined in any way because of the letters that I wrote to Mr. Allen or to the Department of Energy to Admiral DeMarse?

A: Not that I'm aware of

Mr. Geier: Other than your discharge I think is implicit in your statement. . . . .

D.E. 69 (Vol.7) at 9.

b. Deposition of Respondent Merle T. Alvis:

Q: Am I correct in stating that B&W management rewards its employees for good job performance and good conduct by awarding them raises and promotions?

A: Pay increases or merit increases. . . . .

Q: Are you familiar with the letters I wrote to the Navy and to the Department of Energy?

A: I am aware that such letters were written.

Q: Have you seen or read any of them?

A: I don't recall.

Q: Was I ever disciplined in any way for writing those letters other than being fired on

September 21st 1992?

A: I believe I've answered that I was not aware of previous disciplinary files prior to your termination.

Informal Reply Brief of Appellant, exh. E at 17, 18, 30, 31.

3. Deposition Excerpts Relating To Appearance of Obstruction of Justice by Respondents.

a. Deposition of Gary D. Camper, Mr. Clements' then immediate supervisor:

A: I don't recall actually talking to the EAP. I went to speak with Larry Lineberry to actually get a form which is an enrollment thing for the EAP.

Q: Did you fill out an enrollment form?

A: I filled out the enrollment form for EAP and I believe I took it back to Larry Lineberry and that's where the arrangements were actually made.

D.E. 65, attach. B at 32.

b. Deposition of Respondent James A. Conner:

Q: Was a PNR investigation of me conducted

that was not a routine investigation?

A: Not that I'm aware of.

Q: Did you contact anybody with the Department of Energy which includes of course the PNR office about conducting an investigation of me?

A: No. . . . .

D.E. 69 (Vol.7) at 6, 7

4. Excerpt From "Answer Of Defendants To The Second Amended Complaint" Relating To Appearance of Obstruction of Justice by Respondents.

¶ 105. . . . Defendants admit that Defendant Conner told Plaintiff that Pittsburgh Naval Reactors ("PNR") was going to conduct an investigation.

D.E. 36 at 34.

5. Hearing of Motions Transcript Excerpts Relating to Retaliatory Discharge. D.E. 66(Vol.5) at 27-31, 33-35.

THE COURT: I asked you what evidence that you had that anything they did to you was in retaliation for your alleging that you had been sexually harassed. You don't have any, I don't think.

MR. CLEMENTS: Yes, I do. Yes, I do.

THE COURT: Okay.

MR. CLEMENTS: On page ten (10) of eighteen (18) of the attachment to Attachment D ---

THE COURT: Okay. What is that? What do you have?

MR. CLEMENTS: This is documentation of what occurred in a meeting on January the 8th, 1990 with Larry Lineberry, then manager of human resources, and Merle Alvis, manager of employee communications and relations.

THE COURT: Okay. What happened there?

MR. CLEMENTS: I reported my allegation of sexual harassment by Ms. Boykan - and I'm quoting here - "Mrs. Alvis said in an angry tone that Laurie must have been very embarrassed when I reported it to Gary in her presence. She also said," quote, "You must have done something or said something to encourage her to do that. I don't think you are capable of working with women." End quote. That ---

THE COURT: Well, wouldn't that be the logical conclusion of anyone if they had investigated and found out that it was not true? Then certainly that's a logical conclusion that you're not capable of working with ---

MR. CLEMENTS: But listen. "You must have done something or said something to encourage her to do that." What Mrs. Alvis is saying is that she is accepting my word as fact.

THE COURT: No, no, no, I don't think that at all. Well, anyway, I know about the case. I'll just have to go over it and let you know something here just as quickly ---

(at 29)

THE COURT: That's the law. I want the factual evidence that you have that the reason given by the defendant was a sham or pretext. That's what you said you wanted to tell me about.

MR. CLEMENTS: Yes, sir. I have it here. I'm referring to Exhibit M of Statement of Undisputed Material Facts.

THE COURT: Okay.

MR. CLEMENTS: This is the Disciplinary Report that summarizes the reasons why Babcock & Wilcox fired me and actually in this document B&W admits that it fired me for complaining of acts made unlawful by Title 7. In fact, the EEOC investigator told me that ---

THE COURT: All right. Now, where do you see that? Where do they admit that?

MR. CLEMENTS: Okay. I'm going to paraphrase here, sir. It says: "You have professed to following beliefs and made the following accusations against management in your writings."

THE COURT: Right.

MR. CLEMENTS: And I'm going to drop down here to Item six (6).

THE COURT: Okay.

MR. CLEMENTS: "Two (2) company employees, including the president and the general counsel as well as the division vice president, personnel manager, security manager, engineering manager and others have harassed, discriminated against and retaliated against you."

THE COURT: You see, what this document says is that that's what you have alleged.

MR. CLEMENTS: That's right. And they're saying that's why I was fired, for complaining of acts made unlawful by Title 7. That's a retaliatory discharge ---

THE COURT: No, no, no. You were discharged, according to them, for these writings that you, you know, that you wrote and the messages that you sent that they said that there was no foundation or reason for.

(at 33, 34)

MR. CLEMENTS: . . . Babcock & Wilcox, and they will admit, it's an undisputed fact, sir, that they never made me aware of any displeasure they may have had regarding my letter writing. While I was writing letters they rewarded me presumably for good job performance and good conduct with raises and promotions. How am I to know what loyalty is? And I also have a brief argument regarding my loyalty and I would appreciate it if I could do that.

To the extent that my loyalty is an issue, Defendant Conner's deposition contradicts defendants' key assertion. This creates a genuine dispute of material fact, there being a question of fact that this issue must go to trial. In lines sixteen (16) through nineteen (19) of Page thirteen (13) of Mr. Conner's deposition which is attached to Plaintiff's Reply to Defendants' Reply Memoranda of Point and Authority in support of their Motions for Summary Judgment as Exhibit H, I asked him did he have any reason to believe that I was a disloyal employee and he said simply no. Now, Mr. Conner is the vice president and general manager of the Navy nuclear fuel division for Babcock & Wilcox. He is the official spokesperson for the Navy nuclear fuel division and he said that I was not a disloyal employee. And I think that that creates a genuine dispute of material fact. . . .

(at 35)

. . . The defendants allege that my letter writing was an act of disloyalty. My first letter was June 22nd, 1990, but B&W never informed me that the company considered my letter writing to be a disloyal act until the day I was fired, September the 21st, 1992, almost two (2) years later.

6. VA Letter of March 17, 1995, A Copy of Which Is Attached To Plaintiff's Supplemental Filing In Opposition To Defendants' Motion for Summary Judgment Filed With The District Court On 3/23/95, Relating To The Credibility Of Mr. Clements.

DEPARTMENT OF VETERANS AFFAIRS
Medical Center
Salem VA 24153

March 17, 1995 In Reply Refer To: Ward 9-2

TO WHOM IT MAY CONCERN:

I'm writing this letter on behalf of Mr. Clyde E. Clements (SSN: 223-64-3914). I saw Mr. Clements at the Vietnam Veterans Outreach Center on February 20, 1990, at which time I was employed as the Team Leader of the facility. Mr. Clements came to the Outreach Center after experiencing problems at Babcock & Wilcox where he was employed as an engineer. He reported that he was being unfairly treated by management, and in trying to resolve the difficulties that he was experiencing, he was informed by the general manager that his "Vietnam Experiences or problems" were causing all of the trouble. Mr. Clements was informed by a friend that the Outreach Center provided services for veterans experiencing problems with their Vietnam experiences. In talking with Mr. Clements, there was not any indication that he was experiencing any difficulties from his Vietnam experiences. He did not exhibit any of the symptoms to meet the criteria for a diagnosis of Post Traumatic Stress Disorder (PTSD) according to the Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition-Revised. Post Traumatic Stress is the disorder that some veterans experience as a result of their military experiences.

Mr. Clements reported that he had also been referred to the Employee Assistance Program and took a psychological test. I requested a copy of his record from Employee Assistance

of Central Virginia, Inc. Upon receipt of the materials from this facility, I reviewed the MMPI which was administered to Mr. Clements. This instrument did not indicate that Mr. Clements was suffering from PTSD. The test did indicate a moderate scale elevation of Scale 6 (paranoid scale). The interpretation provided by E. Wayne Sloop, Ph.D. seems to be accurate; however, it is not an indication that Mr. Clements is a paranoid personality disorder. The MMPI is an instrument that should not be used as a sole diagnostic tool. It should be used in conjunction with an extensive clinical interview and other evaluation instruments.

In an effort to further assist Mr. Clements, I contacted the Department of Navy Inspector General's Office to see if they investigate Naval contractors and if they could assist Mr. Clements. To the best of my recollection, the IG did not have the authority to be of any assistance.

This letter is written to the best of my recollection of events that occurred in 1990.

Sincerely,

/S/ Robert D. Cox

ROBERT D. COX, M.A.
Director, PTSD Inpatient Program
Salem VA Medical Center